No. 141, Original

Supreme Court, U.S.
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In The
Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO
and STATE OF COLORADO,

Defendants.

ON MOTION FOR LEAVE TO INTERVENE

MOTION OF EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1 FOR LEAVE TO INTERVENE AS A PLAINTIFF, COMPLAINT IN INTERVENTION, AND MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE AS A PLAINTIFF

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April 2015

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El Paso County Water Improvement District No. 1 ("EPCWID") moves for leave to intervene as a plaintiff in this original action filed by the State of Texas against the States of New Mexico and Colorado, in which the United States has intervened as a plaintiff. Texas seeks interpretation and enforcement of the terms of the Rio Grande Compact, signed by the states of Colorado, New Mexico, and Texas on March 18, 1938, and ratified by Congress in the Act of May 31, 1939, ch. 155, 53 Stat. 785 ("Rio Grande Compact" or "Compact"). The Rio Grande Compact was designed to protect the Rio Grande Reclamation

Project, a federal interstate reclamation project authorized in 1905, Act of Feb. 25, 1905, 33 Stat. 814 ("Rio Grande Project" or "Project"). The Project delivers water obligated to Texas under the Rio Grande Compact as well as to New Mexico irrigators in southern New Mexico. EPCWID supplies water to users in El Paso County, Texas, and is the sole direct Texas beneficiary of the Project; the only other direct beneficiary is Elephant Butte Irrigation District ("EBID"), serving water users in southern New Mexico, and who has moved to intervene in this action as well.

As a beneficiary of the Rio Grande Project, EPCWID has interests in interstate Project water storage and delivery, infrastructure in both New Mexico and Texas, and contracts providing for the allocation of water supply from the Project. EPCWID thus has a unique and compelling interest in this Court's resolution of the interstate dispute regarding the waters of the Rio Grande. No other water user in Texas can claim the kind of direct stake which EPCWID has in the interpretation and enforcement of the Rio Grande Compact. EPCWID's interests, however, are not adequately represented by any of the current parties to this case. Accordingly, EPCWID moves the Court for leave to intervene as a plaintiff to ensure its interests are protected and that the Court has before it all the parties to allow full and effective resolution of this critical dispute. This motion is timely given that no proceedings have occurred to date. EPCWID's intervention as a party

will not prejudice any party or duplicate any of the proceedings. EPCWID's Complaint in Intervention is appended to this motion. The basis for this motion is explained more fully in the memorandum that then follows.

DISCLOSURE STATEMENT

EPCWID is a unit of government, being a political subdivision of the State of Texas created pursuant to Article XVI, Section 59 of the Constitution of the State of Texas, and therefore is not required to file a disclosure statement under Rule 7.1 of the Federal Rules of Civil Procedure.

Respectfully submitted,

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COMPLAINT IN INTERVENTION

1. El Paso County Water Improvement District No. 1 ("EPCWID") adopts and incorporates herein by reference the Complaint in Intervention of the United States (Feb. 27, 2014), subject to the additional allegations and prayer by EPCWID hereinafter set forth. *See* Fed. R. Civ. P. 10(c).

2. EPCWID has sustained damages arising from New Mexico's breaches of the Rio Grande Compact, Act of May 31, 1939, ch. 155, 53 Stat. 785 ("Rio Grande Compact" or "Compact"), relating to New Mexico's allowing water users within New Mexico to wrongfully divert, and convert to their own uses, Rio Grande Project water that belongs to EPCWID. WHEREFORE, EPCWID prays that the Court:

(a) declare that New Mexico, as a party to the Compact:

(i) may not violate its obligations under the Compact by permitting water users in New Mexico to intercept or interfere with Rio Grande Project water, and

(ii) must affirmatively act to prohibit or prevent such interception and interference;

(b) permanently enjoin and prohibit New Mexico from permitting such interception and interferences;

(c) mandate that New Mexico affirmatively prevent such interception and interference; and,

(d) grant such other relief as the Court may deem appropriate and necessary to protect the rights, duties, and obligations of EPCWID with respect to the waters of the Rio Grande and the Rio Grande Project.

Respectfully submitted,

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STATEMENT

I. Factual and Legal Background

El Paso County Water Improvement District No. 1 ("EPCWID") is a political subdivision of the State of Texas, created pursuant to the Texas Constitution, Tex. Const. Art. XVI, § 59, and is a direct beneficiary of the Rio Grande Reclamation Project ("Rio Grande Project" or the "Project"). EPCWID is a general law water improvement district subject to Chapter 55 of the Texas Water Code Annotated, performing governmental functions and standing on the same footing as

counties and other political subdivisions. *El Paso Cnty. Water Improvement Dist. No. 1 v. City of El Paso*, 133 F. Supp. 894, 914 (W.D. Tex. 1955), *aff'd as modified*, 243 F.2d 927 (5th Cir. 1957). Texas Water Code Annotated Section 55.161 sets forth the purposes of a water improvement district as follows:

> (a) A water improvement district may provide for irrigation of the land within its boundaries.
>
> (b) A district operating under Article XVI, Section 59, of the Texas Constitution, may furnish water for domestic, power, and commercial purposes.
>
> (c) A district may be formed to cooperate with the United States under the federal reclamation laws for the purpose of:
>
> > (1) construction of irrigation and drainage facilities necessary to maintain the irrigability of the land;
> >
> > (2) purchase, extension, operation, or maintenance of constructed facilities; or
> >
> > (3) assumption, as principal or guarantor, of indebtedness to the United States on account of district lands.

The Rio Grande Project, authorized by Congress in 1905, is an interstate federal reclamation project which commences with the Elephant Butte Reservoir and Dam in New Mexico, approximately 100 miles north of the Texas state line, and extends south into Texas through El Paso County to Fort Quitman. *See*

Act of February 25, 1905, ch. 798, 33 Stat. 814 (extending the Reclamation Act of 1902, 32 Stat. 388 (1902) (codified as amended at 43 U.S.C. § 371, *et seq.*) ("Reclamation Act") to Texas and authorizing the construction of what is now Elephant Butte Dam to provide water for irrigation in Texas and New Mexico) ("Rio Grande Project Act"). Located in a part of the United States with an average annual rainfall of eight inches, EPCWID's users are dependent on Rio Grande water apportioned to Texas under the Rio Grande Compact, Act of May 31, 1939, ch. 155, 53 Stat. 785 ("Rio Grande Compact" or "Compact"), and intended for and allocated to EPCWID through the Rio Grande Project for irrigation, crop production, and municipal uses.

From its share of Project water, EPCWID provides water for irrigation of 69,010 acres of Project land within EPCWID's boundaries in El Paso County, Texas, and for miscellaneous purposes pursuant to contracts entered into with the approval of the Secretary of Interior, in accordance with the Miscellaneous Water Supply Act of 1920, 43 U.S.C. § 521 (2011). In addition to the water it supplies for irrigation, EPCWID furnishes a significant portion of the annual water supply of the City of El Paso.

The Rio Grande Project was authorized to supply irrigation water to Elephant Butte Irrigation District ("EBID") in southern New Mexico and EPCWID in western Texas, and pursuant to international treaty, to Mexico. *See* Rio Grande Project Act; Convention with Mexico for the Upper Rio Grande, 34 Stat. 2953

(1906). Pursuant to the Rio Grande Project Act and contracts entered into under federal reclamation law by the United States Department of the Interior Bureau of Reclamation ("Reclamation"), the federal government is obligated to deliver Project water to EPCWID. *See United States v. City of Las Cruces*, 289 F.3d 1170, 1175-76 (10th Cir. 2002); *Bean v. United States*, 163 F. Supp. 838, 841-42 (Ct. Cl. 1958). EPCWID has reimbursed the United States for EPCWID's share of the United States' reimbursable Project construction costs and now holds title to most of the Project works within its boundaries. *See* Act of Oct. 30, 1992, Pub. L. 102-575, § 3301, 106 Stat. 4600, 4705-06.

The Rio Grande Project grew out of years of investigation to develop an irrigation project to serve lands in southern New Mexico and western Texas. The ultimate development of the Project was based on the proceedings of the Twelfth National Irrigation Congress, held in El Paso in 1904. *See generally* Official Proceedings of the Twelfth National Irrigation Congress (Guy E. Mitchell, Ed., 1905) ("1904 Irrigation Congress"). At the 1904 Irrigation Congress, delegates from New Mexico, Texas, and Mexico agreed to the construction of the reservoir to become known as Elephant Butte in New Mexico, and to store and supply irrigation water to what was recognized as irrigable lands of 110,000 acres in New Mexico and 70,000 acres in Texas, above and below El Paso, as well as delivery to Mexico. *Ibid.* at 107-09, 215. Delivery of Project water and other Project operations commenced in late 1916.

Both prior and subsequent to construction of the Project, development of the waters of the Rio Grande continued upstream in Colorado and New Mexico. The upstream development impeded the flows necessary to support irrigation in southern New Mexico, western Texas, and Mexico. As a result, the United States, through the Secretary of the Interior, effectively imposed a moratorium on water development upstream of the development of the planned location of the Rio Grande Project, in both New Mexico and Colorado. *See* Raymond A. Hill, *Development of the Rio Grande Compact*, 14 Nat. Resources J. 163, 165 (1974 No. 2). Consequently, in 1929, Colorado, New Mexico, and Texas entered into a temporary compact to address the interstate allocation of the waters of the Rio Grande. Act of June 17, 1930, ch. 506, 46 Stat. 767 (approving the 1929 compact).

On March 18, 1938, the three states entered into the current Rio Grande Compact, which apportions the waters of the Rio Grande above Fort Quitman, Texas among Colorado, New Mexico, and Texas. The Compact is designed to protect the Project as a means to ensure Compact water delivered into the Project reaches the Project beneficiaries, including reaching the New Mexico-Texas state line for the benefit of EPCWID. The acceptance by Texas of such apportionment was based in part on the existence and efficient functioning of the Project as planned and anticipated to operate in 1938. *See* Hill, *supra*, at 183-84 (stating that "the Rio Grande Compact Commissioners, at the time of executing the Rio Grande

Compact of 1938, anticipated that . . . compliance by New Mexico with the schedules set forth in Article IV would result in enough water entering Elephant Butte Reservoir to sustain an average normal release of 790,000 acre-feet per year from Project Storage for use on lands in New Mexico downstream of Elephant Butte Reservoir and on lands in Texas and also to comply with the obligations of the Treaty of 1906 for deliveries of water to Mexico").

On February 16, 1938, just a month prior to the signing of the Compact, EBID and EPCWID, the irrigation districts located within the Project and Project beneficiaries, entered into a contract confirming the acreages in each state which would be irrigated from the Project (based on the ratio of respective acreages) with 67/155th of Rio Grande Project water to be distributed to EPCWID, and 88/155th to EBID ("1938 Contract"). *See* Appendix to Brief of the United States as *Amicus Curiae* (Dec. 10, 2013) (reprinting the 1938 Contract). The 1938 Contract, which was approved by the United States, intended that all "useable water," as defined in the Compact, *see* Compact Art. I(l), would be made available to the lands of EBID and EPCWID in the acreage stated in the 1938 Contract (as well as for delivery to Mexico). Neither the 1938 Contract nor the Compact apportioned a specific amount of water to Project users in New Mexico or Texas. However, it was the intent of the 1938 Contract parties as well as the parties to the Rio Grande Compact that once water was delivered by New Mexico into Elephant Butte Reservoir, such

water was obligated to the Project for the purpose of making Project deliveries to the identified irrigable lands in New Mexico and Texas – thereby ensuring Texas received its share of water apportioned under the Compact.

Subsequent to 1938, however, Rio Grande surface and groundwater uses below Elephant Butte Reservoir in New Mexico proliferated, thereby increasing depletions of useable water. The consequence of this proliferation has been depletions in Project deliveries to EPCWID and a reduction in the efficiency of the Project with respect to delivery of water to Texas. The amount of water captured by increased consumptive use in New Mexico has resulted in less return flow in the Rio Grande, increased seepage, and thus less water available for diversion and use in Texas.

In 2007 EPCWID filed suit against EBID and Reclamation seeking relief to remedy ongoing problems as to how Project water, released from Elephant Butte Dam in New Mexico, should be allocated between EBID and EPCWID, and how those allocations should be delivered, taking into account that some of the Project diversion canals cross the New Mexico-Texas border several times. *El Paso Cnty. Water Improvement Dist. No. 1 v. Elephant Butte Irrigation Dist., et al.*, No. EP07CA0027 (W.D. Tex. 2007). EPCWID requested the court declare the contractual obligations of the United States and compel Reclamation to allocate and deliver Project water in accordance with the Rio Grande Project Act and the contracts between and among EPCWID, EBID, and

the United States. The litigation culminated in a settlement agreement which included an operating agreement for the Project ("2008 Operating Agreement") which establishes a method to allocate and deliver Project water released from Elephant Butte Dam under specified hydrologic conditions. The United States currently delivers Project water to EBID, EPCWID, and Mexico in accordance with the 2008 Operating Agreement. New Mexico's violations of the Rio Grande Compact by allowing depletions of Project water below Elephant Butte Reservoir, and interference with the United States' operation of the Project, has, and will continue to have, detrimental effects on EPCWID and the continued viability of the Rio Grande Project.

The Project water rights of EPCWID and the United States have been adjudicated in Texas. In its final decree, the 327th Judicial District Court of El Paso County, Texas, *In Re: Adjudication of All Claims of Water Rights in the Upper Rio Grande (above Fort Quitman, Texas) Segment of the Rio Grande Basin* (No. 2006-3219, Oct, 30, 2006), adjudicated rights authorizing the United States and EPCWID to impound, divert, and use waters of the Rio Grande Project within Texas based on storage and releases in New Mexico ("Texas decree"). The United States (through Reclamation) is a joint owner with EPCWID of the water rights adjudicated in the Texas decree. The Texas Commission on Environmental Quality, on March 7, 2007, issued a Certificate of Adjudication pursuant to the Texas decree, summarizing the rights

of EPCWID and the United States to store, divert and use Project water ("TCEQ Certificate") (reprinted in the Appendix to this brief). The TCEQ Certificate provides for the right of EPCWID to store and release water from Elephant Butte Reservoir and Dam in New Mexico and to have such water delivered through the Rio Grande Project in New Mexico for diversion and use in Texas. TCEQ Certificate ¶¶ 1(b), 3.

There are two ongoing cases in New Mexico relating to the water supply and operation of the Rio Grande Project, but, although EPCWID is involved in both, neither case can provide the relief requested in this matter by Texas, the United States, or EPCWID. EPCWID is a defendant in the suit brought by New Mexico in the United States District Court in New Mexico seeking to void the 2008 Operating Agreement, *New Mexico v. U.S. Bureau of Reclamation, et al.*, CIV-11-691-JB/ACT (D.N.M., filed Dec. 20, 2011), and is *amicus curiae* in the New Mexico general stream adjudication in New Mexico state court, *New Mexico ex rel. N.M. State Eng'r v. Elephant Butte Irrigation Dist., et al.*, No. CV-96-888, SS-97-104 (Third Jud. Dist. Ct., N.M., filed Sept. 24, 1996). In both cases, New Mexico has advanced legal positions that conflict with its obligations under the Compact; and in neither case are the other Compact parties subject to the court's jurisdiction.

II. Procedural Background

The Court granted Texas' Motion for Leave to File Bill of Complaint after receiving briefing on the

Motion from Colorado, New Mexico, and Texas, and *amici curiae* the United States, EPCWID, the City of El Paso, Texas, the City of Las Cruces, New Mexico, and Hudspeth County [Texas] Conservation and Reclamation District No. 1. The United States then moved to intervene as a party and such motion was granted. Pursuant to the Court's order, New Mexico moved to dismiss Texas' Bill of Complaint. The City of Las Cruces, New Mexico, filed a brief *amicus curiae* supporting New Mexico's motion. The United States and Texas, supported by *amici curiae* the City of El Paso, Texas, Hudspeth County Conservation and Reclamation District No. 1, and EPCWID, opposed the motion to dismiss. The motion is pending.

The Court appointed A. Gregory Grimsal, Esquire, as Special Master "with authority to fix the time and conditions for the filing of additional pleadings, to direct subsequent proceedings, to summon witnesses, to issue subpoenas, and to take such evidence as may be introduced and such as he may deem it necessary to call for." Order (Nov. 3, 2014). After appointment of the Special Master, EBID, in its own right as one of the two direct beneficiaries of the Rio Grande Project, filed with the Court a motion to intervene. New Mexico, Texas, Colorado, and the United States filed responses. EBID's motion to intervene is pending.

While not yet a party to these proceedings, EPCWID has been discussed in the majority of the briefs filed to date. This is appropriate given EPCWID's unique position as a direct beneficiary of

the Rio Grande Project, a party to the 2008 Operating Agreement, by which Reclamation, EBID, and EPCWID allocate and distribute the waters of the Rio Grande Project, the joint holder of rights under the Texas decree relating to a water right in the Rio Grande Project in New Mexico for diversion and use in Texas, and party or *amicus curiae* to proceedings in New Mexico state and federal district court.

ARGUMENT

EPCWID is one of two direct beneficiaries of the interstate Rio Grande Project which both creates New Mexico's delivery obligation under the Rio Grande Compact and establishes Texas' rights to the waters of the Rio Grande. The Project and the contracts relating to delivery of water therefrom, and not the Compact, specifically provide for allocation of water as between the Project beneficiaries in New Mexico and Texas. The Compact, however, was designed to ensure the Project could deliver water as contemplated by the Rio Grande Project Act and the 1938 Contract. As a beneficiary of the Rio Grande Project, EPCWID is a party to contracts with the United States and EBID for delivery of water from the Project, including the 2008 Operating Agreement which allocates water as between Project users in New Mexico and Texas. As a distributor of Project water, EPCWID owns, maintains, and operates irrigation infrastructure which crosses and re-crosses the state line to ensure delivery to both New Mexico and Texas

users. Moreover, as a holder of decreed rights in and to the waters of the Rio Grande Project, EPCWID has rights to water in both Texas and New Mexico: rights of storage and release in New Mexico, and rights of diversion and use in Texas.

These interests are sufficient for EPCWID to satisfy the Court's standard for intervention in original actions:

> "An intervenor whose state is already a party should have the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state."

South Carolina v. North Carolina, 558 U.S. 256, 266 (2010) (quoting *New Jersey v. New York*, 345 U.S. 369, 373 (1953) (per curiam)). The unique interests of EPCWID that exist in both Texas and New Mexico are similar to, if not more compelling than, non-state entities the Court has previously allowed to intervene in other cases. EPCWID has a direct stake in the controversy and its participation as a party is necessary in order for the Court to afford full and effective relief in this complex dispute. EPCWID's interests are not adequately represented by Texas or any other party. EPCWID's intervention will not prejudice the parties, but rather will allow full explication of the myriad issues which must be addressed to resolve the matters presented in this unique and complex interstate dispute. EPCWID should be granted leave to intervene.

I. EPCWID's direct stake and interests in the Rio Grande Project are sufficient to satisfy the Court's standard for intervention in this original action.

The Court's standard for intervention by non-state entities in original actions focuses on the particular interests of the putative intervenor in the context of the specific legal and factual circumstances of each case. Under that standard, the Court has considered and allowed intervention by non-state entities where the entity shows a "compelling interest in its own right." *New Jersey v. New York*, 345 U.S. at 373. The Court has allowed intervention when the putative intervenor has demonstrated a significant direct stake in the controversy or interests unique from other water users, particularly where those interests are situate in more than one state. *See, e.g.*, *South Carolina v. North Carolina*, 558 U.S. 256; *Arizona v. California*, 460 U.S. 605 (1983); *Maryland v. Louisiana*, 451 U.S. 725 (1981). EPCWID has a direct stake in the waters of the Rio Grande in both New Mexico and Texas and a unique and compelling interest in its own right in this interstate compact dispute.

A. EPCWID has a direct stake in this controversy based on its interest in the Rio Grande Project and contracts allocating Project water between New Mexico and Texas.

EPCWID has a compelling interest in the enforcement of the terms of the Rio Grande Compact based on its bi-state interests in the interstate Rio Grande Project and its interest in the contracts which effectuate the delivery of water obligated to Texas under the Compact. Accordingly, intervention is proper because EPCWID has a "direct stake in [the] controversy." *Maryland v. Louisiana*, 451 U.S. at 745 n.21 (permitting intervention of seventeen privately-owned pipeline companies upon whom the tax at issue was imposed because the companies have "a direct stake in this controversy"). If the case at hand will adjudicate rights belonging to the intervenor and have *stare decisis* effect with respect to those interests, intervention is proper. *See Texas v. New Jersey*, 379 U.S. 674, 677 n.6 (1965). And intervention will be allowed where it is necessary to have non-state entities as parties before the Court to effectuate full and effective relief. *See South Carolina v. North Carolina*, 558 U.S. at 272 (allowing intervention of power company and bi-state water project); *Arizona v. California*, 460 U.S. at 613-15 (allowing intervention of Indian tribes).

The recent case of *South Carolina v. North Carolina* is particularly instructive in demonstrating that EPCWID's direct stake in the Project supports its

intervention. 558 U.S. 256. EPCWID is similarly situated to both entities the Court permitted to intervene in that case, the Catawba River Water Supply Project ("CRWSP") and Duke Energy Carolina, LLC ("Duke"). CRWSP is a bi-state entity that delivers Catawba River water to residents of both states, relying on authority from both states to divert and deliver water. *Ibid.* at 269. It has significant infrastructure investments necessary to comply with its delivery obligations. *Ibid.* Given CRWSP's significant investments and obligations, the Court ruled that it satisfied the standard for non-state intervention because "[a]ny disruption to the CRWSP's operations would increase – not lessen – the difficulty of our task in achieving a 'just and equitable' allocation in this dispute." *Ibid.* at 270. EPCWID's contracts with the United States to receive Project water, and obligations to irrigators and contracts with other users, including the City of El Paso, demonstrate it has a similarly direct stake in this original action as CRWSP in *South Carolina v. North Carolina*. The ability of EPCWID to receive and to distribute water is premised on the effective operation of the Rio Grande Project in both New Mexico and Texas, and pursuant to contracts with the United States and EBID. The effective operation of the Project is dependent on New Mexico's compliance with its Compact obligations to deliver – and not then take back – water to the Project for use by EPCWID as Texas' apportionment of Rio Grande water.

South Carolina v. North Carolina also ruled that Duke, an energy generator and supplier in both states, had a sufficiently unique and compelling interest to support intervention because its interests straddled the two states, and because Duke had significant obligations and contracts with regard to water and power distribution. 558 U.S. at 272-73. As the only signatory to the 2008 Operating Agreement which represents the interests of Rio Grande Project water users in Texas, EPCWID's position is analogous to that of Duke, as "[i]t is likely that any equitable apportionment of the river will need to take into account the amount of water that" EPCWID needs to satisfy its Project related rights and obligations, and therefore EPCWID has "a strong interest in the outcome of this litigation." *Ibid.* at 272. "There is, moreover, no other similarly situated entity on the [Rio Grande in Texas], setting [EPCWID's] interests apart from the class of all other citizens of the States." *Ibid.*

EPCWID's direct interests in the Project, as a party to numerous contracts with EBID, Reclamation, and users to whom EPCWID delivers Project water, means that EPCWID is directly affected by New Mexico's violations of the Rio Grande Compact. This direct effect is analogous to the liability of the pipeline companies in *Maryland v. Louisiana* for the tax in dispute, an interest the Court found sufficiently direct to support intervention. 451 U.S. at 745 n.21. Any interpretation or enforcement of the Compact by this Court will directly impact EPCWID, its

ability to receive water and its obligations for water deliveries. EPCWID should be allowed to intervene to protect its direct stake in the Project and the waters obligated to Texas under the Compact.

B. EPCWID has a unique and compelling interest in its own right to the waters of the Rio Grande in both New Mexico and Texas.

EPCWID's interests, as a beneficiary of the Project which crosses (indeed crisscrosses) state lines, a party to the contracts which provide for bi-state operations and allocations of water, and with water rights in the Rio Grande Project in New Mexico for use in Texas, are sufficiently unique and compelling to support intervention.

In *South Carolina v. North Carolina,* the Court found significant for intervention the fact that both Duke and CRWSP had contractual and other interests in the Catawba River in both South Carolina and North Carolina. 558 U.S. at 270, 273. Those bi-state interests could not neatly be attributed to any one state and the allocation of water from the River as advocated by the respective states would affect the interests of Duke and CRWSP in both states. The Court noted that "neither State has sufficient interest in maintaining that balance to represent the full scope of CRWSP's interests." *Ibid.* at 271. In contrast, the Court denied intervention by the City of Charlotte because the Catawba River was allocated based

on state borders, and Charlotte had no interests that were unique from other North Carolina users. *Ibid.* at 274-75. EPCWID's interests are akin to those of Duke and CRWSP in terms of its bi-state interests premised on the interstate Rio Grande Project. The waters of the Rio Grande are not allocated based on state borders, but on interests in the Project, and the Texas decree adjudicating EPCWID's rights in Project water provides for storage and release in New Mexico for diversion and use in Texas. That decree, and the TCEQ Certificate incorporating and relying thereon, provides for EPCWID to divert and use water in Texas, and specifically recognizes that those rights literally flow from the Rio Grande Project, which stores and releases the water in New Mexico. *See* TCEQ Certificate ¶¶ 1(b), 3. EPCWID's bi-state interests also include the complex system of irrigation infrastructure of the interstate Project. The Project irrigation infrastructure which EPCWID owns, maintains, and operates crisscrosses the state line to provide Project water supply to irrigators in both New Mexico and Texas.

EPCWID's interests in the Rio Grande Project and the waters allocated therefrom are also sufficient to satisfy the compelling interest stated by the Chief Justice in his opinion dissenting from the portion of *South Carolina v. North Carolina*, allowing Duke and CRWSP to intervene. Indeed, the Chief Justice's dissent seemed to presage EPCWID's interests here. In articulating an analysis that intervention in

original actions should be extremely limited, Chief Justice Roberts stated:

> The number of nonsovereigns that the Court should permit to intervene in water disputes is small – indeed, it was zero until today. But that does not mean that a private entity could not satisfy the *New Jersey v. New York* test by, for example, *asserting water-use rights that are not dependent upon the rights of state parties. A private party (or perhaps a Compact Clause entity) with a federal statutory right to a certain quantity of water might have a compelling interest in an equitable apportionment action that is not fairly represented by the States.* The putative intervenors in this case, however, do not hold rights of this sort.

558 U.S. at 282 n.1 (Roberts, C.J., concurring in the judgment and dissenting in part) (emphasis added). Unlike Duke and CRWSP, whom the Chief Justice thought lacked an interest sufficient to support intervention, EPCWID does in fact have a right to a certain quantity of water pursuant to its interests in the Project, its federal reclamation contracts, and the Texas decree. Accordingly, EPCWID has just the kind of "compelling interest" that must be shown by a non-state entity seeking to intervene in an original action recognized by both the majority and dissent in *South Carolina v. North Carolina.*

The unique circumstances of this case support intervention by EPCWID. Similar to other interstate water compact disputes brought before the Court,

this case is not easily or readily determined by examining the four corners of the Compact. *See, e.g.*, *Kansas v. Nebraska*, ___ U.S. ___, 135 S. Ct. 1042, 1049-50 (2015) (discussing decision of the special master that increase in groundwater pumping which depleted surface flows violated the Republican River Compact which spoke only to surface water); *Kansas v. Colorado*, 514 U.S. 673, 690-91 (1995) (increase in groundwater pumping which depleted surface flows violated the Arkansas River Compact which on its face related only to surface water). Here, in order to properly interpret and enforce the terms of the Rio Grande Compact, in addition to the Compact itself, the Court must examine and determine the rights and obligations in and to the Rio Grande Project and the contracts relating to the Project. Although Texas is a party to the Compact, the State itself is not a direct beneficiary to the Rio Grande Project, and is not a party to either the 1938 Contract or the 2008 Operating Agreement allocating, as among the two irrigation districts, the available water from the Project. It is those Project contracts that allocate the waters of the Rio Grande below Elephant Butte Dam, not the Rio Grande Compact.[1] Accordingly, for

[1] The essential relevancy of the contracts and the fact that New Mexico's delivery obligation is to the Project at Elephant Butte, rather than at the state line, does not transform this from a dispute regarding the Rio Grande Compact, into, as New Mexico would have it, one of state water law administration within the Project. To the contrary, a principal purpose of the Compact is to protect the Project, including its ability to deliver water to the Texas state line. The delivery to the Project and the

(Continued on following page)

purposes of intervention, it is not relevant that EPCWID is not a party to the Compact. Rather, what is relevant here is the fact that EPCWID is one of the two direct Project beneficiaries who are parties to the contracts which allocate water from the Project, which includes Texas Compact water released from Elephant Butte Dam.

EPCWID's unique interests are akin to those interests found sufficient to support intervention in prior original action cases. In *Arizona v. California*, the Court granted intervention to two Indian tribes as without their presence as parties who claimed a significant interest in the disputed stream system, the case could not be fully or effectively resolved. 460 U.S. at 614-15. Intervention was proper despite the fact that the United States was a party to the case and represented the tribal interests. EPCWID has a direct interest in the water subject to the Rio Grande Compact. As with the tribes in *Arizona v. California*, no full or effective relief may be afforded without EPCWID's intervention.

In *Oklahoma v. Texas*, an action involving a boundary dispute between the states, the Court allowed landowners to intervene where their ownership interests would be potentially affected by the outcome of the boundary dispute. 258 U.S. 574, 581

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continued availability of that water to Project water users in the two states through EBID and EPCWID, is New Mexico's obligation under the Compact. New Mexico is violating this obligation.

(1922). Like the landowners in *Oklahoma v. Texas*, EPCWID has a direct interest in the "property" in dispute in this original action. Texas claims (and EPCWID agrees) that New Mexico is violating its Rio Grande Compact obligations by absconding with Compact water delivered to the Project after it has been released from Elephant Butte Reservoir but before it can reach Texas and not for authorized Project (or Compact) uses. EPCWID has a direct interest in the water Texas and the United States allege New Mexico is allowing to be unlawfully taken from the Project supply.

In *Texas v. Louisiana*, the City of Port Arthur, a political subdivision of the State of Texas, was granted leave to intervene. 416 U.S. 965 (1974). The interests Port Arthur sought to protect were its property interests in islands claimed by the United States. *Texas v. Louisiana*, 426 U.S. 465, 466 (1976). Similarly, here, EPCWID, a political subdivision of Texas, should be granted leave to intervene to protect its rights to waters stored in and delivered by the Project and protected by the Compact.

EPCWID's presence as a party will allow "full exposition of the issues" relating to the Project and the contracts essential to interpret the Rio Grande Compact, a factor the Court has found significant to allowing non-states to intervene in the past. *See Maryland v. Louisiana*, 451 U.S. at 745 n.21 (granting intervention to private pipeline companies because the companies would be liable for paying the disputed tax and their presence was necessary for

"full exposition of the issues"). New Mexico's obligations under the Compact are not a state line delivery, but are to the Project upstream at the Elephant Butte Reservoir in New Mexico. Accordingly, this interstate compact dispute cannot be resolved without understanding and addressing the Project, its operations, and the contracts providing for deliveries from the Project. Under the unique circumstances of this case, in addition to the compacting states, the entities with interests in the Project, the United States, EBID, and EPCWID, all must be parties before the Court to allow full resolution of the Compact dispute which Texas has brought to this Court. The United States has already appropriately been granted intervention based on its asserted interests not in the Compact *per se*, but in the Rio Grande Project. *See* United States Motion to Intervene, at 2; United States Complaint in Intervention, at 5, ¶ (a). EBID has moved to intervene, and EPCWID supports EBID's request for intervention.[2] EPCWID now requests leave to intervene, and EPCWID's motion should be granted.

II. EPCWID is not adequately represented by any party.

EPCWID has presented a sufficiently unique and compelling interest, the corollary of which is that no

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[2] In its reply brief regarding its motion to intervene, EBID appropriately recognizes that EPCWID should be granted leave to intervene. EBID's Reply to Briefs Opposing Motion for Leave to Intervene 30 (March 20, 2015).

other party may completely or adequately represent that interest. While it is true that "the state, when a party to a suit involving a matter of sovereign interest, 'must be deemed to represent all its citizens,'" *New Jersey v. New York*, 345 U.S. at 372-73 (quoting *Kentucky v. Indiana*, 281 U.S. 163, 173-74 (1930)), EPCWID's interests are different from those of the citizens of Texas generally and are not adequately represented by Texas in this case. While sharing interests in ensuring New Mexico complies with its Compact obligations, EPCWID's and Texas' rights and interests are not identical. *See* Texas' Supplemental Brief in Response to New Mexico's Supplemental Brief 5 (Jan. 7, 2014) ("Texas is not a party to EPCWID's 1938 contract with the United States and, more importantly, Texas here seeks relief pursuant to its rights under the Compact and not pursuant to EPCWID's 1938 or any other contract with Reclamation."). Because EPCWID's "water use rights . . . are not dependent upon the rights of state parties" EPCWID has a "compelling interest . . . that is not fairly represented by the States." *South Carolina v. North Carolina*, 558 U.S. at 282 n.1 (Roberts, C.J., concurring in part and dissenting in part).[3]

Texas is not a specific beneficiary of the Rio Grande Project or a party to the contracts providing

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[3] Although Texas is not a party to those contracts, as discussed above, those contracts and EPCWID's interests in the Project are essential to interpreting and enforcing the Compact and full resolution of the dispute before the Court.

for the allocation of Project water, and therefore will not be able to fully represent EPCWID's rights to receive its share of Project water supply. Furthermore, Texas has not "expressed an intention to defend [the] terms" of the 2008 Operating Agreement or the 1938 Contract. *Ibid.* at 273 ("Given the importance of Duke Energy's interests and their relevance to our ultimate decision, we believe these interests should be represented by a party in this action, and we find that neither State is situated to do so properly."). Although, the rights of Texas in the Compact are interrelated with the Project, this cannot substitute for EPCWID's direct stake in Project contracts that both pre-and post-date the Compact and which specifically direct how water will be allocated for delivery to EPCWID in Texas. Those interests are sure to be affected by the outcome of this case.

Due to the unique factors present in the Rio Grande Compact, namely that New Mexico's water deliveries for Texas are made into Elephant Butte Reservoir more than 100 miles north of the state line, Texas' interests in the Compact are not truly *parens patriae* with regard to EPCWID. The relationship between Texas and EPCWID is unlike that present in *New Jersey v. New York*, where the Court did not permit Philadelphia to intervene because Pennsylvania, as *parens patriae*, adequately represented the City's interests. *New Jersey v. New York*, 345 U.S. at 373. The Court stated:

> [t]he principle is a necessary recognition of the sovereign dignity, as well as a working

> rule for good judicial administration. Otherwise, a state might be judicially impeached on matters of policy by its own subjects, and there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties.

Ibid. Here, however, with the exception of EPCWID no Texas "citizen" is entitled to be a party, as all other Texas citizens lack the bi-state and contractual interests that EPCWID has in the Rio Grande Project, and thus EPCWID is unique in not being represented by Texas as *parens patriae*.

Nor does the United States adequately represent the interests of EPCWID. As is made plain by its memorandum in support of its motion for intervention, the United States has intervened in this action to protect its independent sovereign interests and does not represent nor purport to represent EPCWID. *See* United States' Memorandum in Support of Motion to Intervene as a Plaintiff 4, ¶ 3 (seeking to protect its "distinctively federal interests") (internal quotation marks and citations omitted). Although the United States has an interest in the Rio Grande Project, and is party to contracts providing for the allocation and delivery of Project water to and in Texas, its interests are in the Project as a whole. In contrast, EPCWID has direct interests with respect to ensuring receipt and delivery of Project water ostensibly protected by the Compact. While some of the interests of the United States and EPCWID are aligned, this does not preclude intervention by

EPCWID. *See WildEarth Guardians v. U.S. Forest Serv.*, 573 F.3d 992, 996-97 (10th Cir. 2009) (United States Forest Service lessee granted leave to intervene because "the government's representation of the public interest generally cannot be assumed to be identical to the individual parochial interest of a particular member of the public") (internal quotation marks and citations omitted). And where, as here, the interests of the United States relate to the operation of the Project as a whole and not directly to specific allocations of water, intervention is proper. *See S. Dakota v. Ubbelohde*, 330 F.3d 1014, 1025 (8th Cir. 2003) (concluding downstream water users not adequately represented by Army Corps of Engineers, which was "charged with managing the Missouri River system as a whole" and thus "the *parens patriae* presumption . . . does not present an obstacle to intervention").

Moreover, historically, EPCWID and the United States have disagreed over the proper allocation of water from the Project. Those disagreements caused EPCWID to file the 2007 lawsuit against Reclamation for failure to deliver the proper allocation of Project water to Texas. As discussed above, that case was settled by the execution of the 2008 Operating Agreement. While the 2008 Operating Agreement resolved that dispute, EPCWID must independently protect its interests in the water allocated pursuant to that agreement and its broader interests in the Project. The United States does not adequately represent the interests of EPCWID.

III. The participation of EPCWID as a party will aid the Court's decision.

EPCWID is the sole Texas governmental entity that is a party to the 2008 Operating Agreement and a joint holder, with Reclamation, of water rights adjudicated by the Texas decree for the waters obligated to Texas under the Rio Grande Compact, and thus will be directly affected by the Court's interpretation of the rights and obligations of the parties to the Rio Grande Compact. EPCWID is acutely aware of the importance of the issues brought before this Court by Texas and of resolving New Mexico's Compact violations in the only forum that may consider and resolve the full nature of the dispute.

Because of EPCWID's unique bi-state interests as a direct stakeholder in the allocation of Rio Grande Project (and Compact) water, allowing EPCWID to intervene will not open the floodgates to intervention by any other Texas water user. No other water user in Texas can claim the kind of direct and compelling stake which EPCWID has in the interpretation and enforcement of the Rio Grande Compact. There is no risk that intervention by EPCWID will alter the Supreme Court's original jurisdiction "to the dimensions of ordinary class actions." *New Jersey v. New York*, 345 U.S. at 373. Other than EBID, there are no other similarly situated entities. *See South Carolina v. North Carolina*, 558 U.S. at 269, 272 (finding the absence of similarly situated entities significant to granting the motions for leave to intervene of Duke and CRWSP).

IV. Granting EPCWID leave to intervene will not prejudice the parties.

EPCWID's intervention will not cause delay or undue prejudice to the existing parties. *See Arizona v. California*, 460 U.S. at 615; *Alabama v. North Carolina*, 560 U.S. 330, 355-56 (2010). EPCWID "do[es] not seek to bring new claims or issues against the states, but only asks leave to participate" based on its vital rights at issue in this case. *Arizona v. California*, 460 U.S. at 614 (concluding intervention by the Tribes did not "enlarge[ ]" the Court's judicial power or compromise the States' Eleventh Amendment immunity). Moreover, New Mexico's Motion to Dismiss and EBID's Motion to Intervene remain pending and no proceedings have occurred.

CONCLUSION

For the reasons stated herein, EPCWID respectfully requests the Court grant it leave to intervene in this original action.

Respectfully submitted,

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April 2015

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

[SEAL]

CERTIFICATE OF ADJUDICATION

CERTIFICATE OF ADJUDICATION NO. 23-5940

Names of Holders:
United States of America

El Paso County Water Improvement District No. 1

Address:
Bureau of Reclamation
505 Marquette NW, Suite 1313
Albuquerque, NM 87102-2162

294 Candelaria Street
El Paso, TX 79907

Priority Dates:
July 6, 1889 and January 1, 1918

Purpose:
Agricultural, Municipal, Industrial, Mining, and/or Recreational Uses

Counties:
El Paso and Hudspeth

Watercourse:
Rio Grande (above Ft. Quitman, Texas)

Watershed:
Rio Grande Basin

WHEREAS, in 1905, the United States enacted the Rio Grande Reclamation Project Act of February 25, 1905, 33 Stat. 814, authorizing the construction of storage facilities on the Rio Grande in the Territory of New Mexico for storage of water of the Rio Grande for irrigation of lands in New Mexico and Texas for the Rio Grande Reclamation Project;

WHEREAS, in 1905, the State of Texas enacted House Bill 588, 29th Legislature, Chapter 101 (as amended, now Section 11.052 of the Texas Water Code), which authorized the Secretary of the Interior to make all necessary examinations and surveys for, and to locate and construct reclamation works for irrigation purposes within the State of Texas, and to perform any and all acts necessary to carry into effect the provisions of the Reclamation Act of 1902 (38 Stat. 388, now 43 U.S.C. § 371, *et seq.*) as to such lands, subject to all the provisions, limitations, charges, terms and conditions of the said Reclamation Act;

WHEREAS, Section 8 of the Reclamation Act of 1902 (now 43 U.S.C. §§ 372 and 383) provides in part: "Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.";

WHEREAS, in 1906, the United States entered into the Convention with Mexico for the Rio Grande providing for the equitable distribution of water of the Rio Grande for irrigation purposes (34 Stat. 2953).

The Convention also provides that the delivery of said amount of water to Mexico shall be assured by the United States, and shall be distributed through the year in the same proportions as the water supply furnished from said irrigation system to lands in the United States in the vicinity of El Paso, Texas, and in case of extraordinary drought or serious accident to the irrigation system in the United States, the amount delivered to Mexico at the Acequia Madre shall be diminished in the same proportion as the water delivered to lands under said irrigation system in the United States. Under Article IV of such Convention, Mexico waived any and all claims to the waters of the Rio Grande for any purpose whatever between the head of the Acequia Madre and Fort Quitman, Texas;

WHEREAS, in 1906 and 1908, pursuant to the Reclamation Act of 1902, the Reclamation Service notified the Territorial Irrigation Engineer for the Territory of New Mexico of reservations by the United States of Rio Grande water for the Rio Grande Reclamation Project in accordance with the laws of the Territory of New Mexico;

WHEREAS, in 1910, Congress approved an Act (36 Stat. 559) which enabled the people of New Mexico to form a constitution and state government and to be admitted to the Union on an equal footing with the original States. Section 2 of such Act provided in part, "that there be and are reserved to the United States, with full acquiescence of the State [New Mexico], all rights and powers for the carrying out of

the provisions by the United States of an Act of Congress entitled 'An Act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands' approved June seventeenth, nineteen hundred and two, and Acts amendatory thereof or supplementary thereto [43 U.S.C. § 371 *et seq.*], as to the same extent as if said State had remained a Territory";

WHEREAS, in 1911, the State of Texas adopted what is now Section 11.005, Texas Water Code, which provides as follows: "This chapter applies to the construction, maintenance, and operation of irrigation works constructed in this state under the federal reclamation act, as amended (43 U.S.C. Sec. 371 et. seq.), to the extent that this chapter is not inconsistent with the federal act or the regulations made under that act by the secretary of the interior.";

WHEREAS, the United States stores water in two reservoirs, Elephant Butte and Caballo, located in New Mexico, for use throughout the Rio Grange [sic] Reclamation Project and for delivery to Mexico. The United States releases water from such storage and supplements such released water with return flow to the Rio Grande and water in the Rio Grande from other sources, and diverts such water at a series of diversion dams on the Rio Grande in New Mexico and Texas;

WHEREAS, the United States purchased lands, canals and water rights in Texas for the construction

of the Rio Grande Reclamation Project, and such purchases included, without limitation, the Franklin Canal and the lands and water rights identified in the Loomis affidavits of 1889, later embodied in Certified Filing No. 123, using Reclamation funds which were subject to reimbursement to the United States by Rio Grande Reclamation Project water users;

WHEREAS, in 1939, the United States, Colorado, New Mexico and Texas entered into the Rio Grande Compact (53 Stat. 785; Section 41.009, Texas Water Code), which constitutes statutory law of the United States and the States of Colorado, New Mexico, and Texas and by the terms of the Compact cannot be modified without the approval of all four parties to the Compact;

WHEREAS, the United States releases stored water from Elephant Butte and Caballo Reservoirs to supply water to the Elephant Butte Irrigation District in New Mexico and the El Paso County Water Improvement District No. 1 in Texas. The first two diversion dams downstream of Caballo Dam (Percha Diversion Dam and Leasburg Diversion Dam) are used by the United States to deliver water to land in New Mexico. A substantial amount of water diverted by these two diversion dams for use in New Mexico is returned to the Rio Grande for use downstream of the dams. The next downstream diversion dam is the Mesilla Diversion Dam, which is located in New Mexico but is used to divert water to both the Elephant Butte Irrigation District and the El Paso County Water Improvement District No. 1. The

American Diversion Dam is the next diversion dam downstream on the Rio Grande. It is the first diversion dam in Texas, and divides water in the Rio Grande between Mexico and the United States. Water for Mexico is provided by the United States and delivered to Mexico at the International Diversion Dam, in the Rio Grande downstream of the American Diversion Dam. Water for the El Paso County Water Improvement District No. 1 is presently diverted by the United States into the American Canal at the American Diversion Dam, but for many years the United States diverted some of such water at the Riverside Diversion Dam, which is presently not functional but may be rebuilt in the future;

WHEREAS, approximately 2.3 miles downstream from the American Diversion Dam is the International Diversion Dam. The International Diversion Dam is used to provide and deliver 60,000 acre-feet of water per year to Mexico pursuant to the 1906 Convention, and is the only diversion location authorized by the 1906 Convention or any other treaty between the United States and Mexico for diversion of water from the Rio Grande upstream of Fort Quitman, Texas. The Riverside Diversion Dam is the last downstream diversion dam on the Rio Grande below Caballo Dam and upstream of Fort Quitman, Texas. The Riverside Diversion Dam is presently not functional but may be rebuilt in the future;

WHEREAS, the United States entered into a contract dated December 29, 1917, with the El Paso County Water Improvement District No. 1 and the El

Paso Valley Water Users' Association. Thereafter, the El Paso Valley Water Users' Association was dissolved;

WHEREAS, the El Paso County Water Improvement District No. 1 ("District") is a political subdivision of the State of Texas, organized and existing under Article XVI, Section 59 of the Texas Constitution, and is subject to Chapter 55 of the Texas Water Code and other provisions thereof. The District is authorized by statute to enter into contracts or other obligations with the United States (§ 55.185, Texas Water Code). By statute the District is required to " . . . distribute and apportion all water acquired by the district under a contract with the United States in accordance with acts of Congress, rules and regulations of the secretary of the interior, and provisions of the contract" (Section 55.364, Texas Water Code). The El Paso County Water Improvement District No. 1 includes 69,010 acres within its boundaries that are classified by the United States and the District as irrigable;

WHEREAS, in 1920, the El Paso County Water Improvement District No. 1 merged with the El Paso County Conservation and Reclamation District No. 2, with the merged districts thereafter known as the El Paso County Water Improvement District No. 1;

WHEREAS, in 1924, the United States entered into a contract (the "Warren Act Contract") with the Hudspeth County Conservation and Reclamation District No. 1 ("HCCRD"), pursuant to the Warren Act of

1911 (43 U.S.C. §§ 523-525), and the parties amended such contract in 1951. HCCRD holds Texas Permit No. 236 as amended by Permit No. 236A. Such permit authorizes HCCRD to divert water from the Rio Grande at two grade control structures, located at latitude 31.413 degrees north 106.096 degrees west in El Paso County, Texas and at latitude 31.318 degrees north and longitude 105.936 degrees west in Hudspeth County, Texas;

WHEREAS, in 1996, the United States conveyed to the El Paso County Water Improvement District No. 1 certain facilities and rights-of-way within the District's boundaries but reserved ownership of the American Canal, the American Canal Extension, and the American, International and Riverside Diversion Dams;

WHEREAS, pursuant to 43 U.S.C. § 521, which allows the Secretary of the Interior to authorize conversion of water used in the Rio Grande Reclamation Project from irrigation to other uses, the United States entered into contracts with the El Paso County Water Improvement District No. 1 and the City of El Paso in 1941, 1944, 1949, 1962, 1999, and 2001 for the supply of Rio Grande Reclamation Project irrigation water for municipal and industrial uses by the City. The United States, the El Paso County Water Improvement District No. 1, and the Lower Valley Water District entered into similar contracts in 1988 and 1999 pursuant to 43 U.S.C. § 521 as well;

WHEREAS, in 1991, the District applied for a permit and asserted in its application that without waiving any, and while still preserving all, of its legal and "equitable" rights under federal and state law, (including, without limitation, the Rio Grande Compact; the 1906 Water Convention, May 21, 1906, between the United States and Mexico; contracts between or among the El Paso County Water Improvement District No. 1 and other entities, including the United States and New Mexico or its agencies; the Reclamation Laws of the United States and those acquired in New Mexico by virtue of the reservation of water rights by the United States as provided by notices from the United States to the New Mexico Territorial Engineer in 1906 and 1908). The Texas Natural Resource Conservation Commission (the "Commission") recognized that the El Paso County Water Improvement District No. 1 had those rights to that portion of the facilities and water of the Rio Grande Reclamation Project and the Rio Grande and its tributaries which have been reserved for or appropriated by or for the benefit of the District and its predecessors and beneficial users or which otherwise have been provided to them by law, equity or contract;

WHEREAS, pursuant to such application, the Commission issued to the District Permit No. 5433;

WHEREAS, by final decree of the 327th Judicial District Court of El Paso County, Texas, in Cause No. 2006-3219 [sic], In Re: Adjudication of All Claims of Water Rights in the Upper Rio Grande (above Fort

Quitman, Texas) Segment of the Rio Grande Basin, dated October 30, 2006, rights were recognized authorizing the United States and the El Paso County Water Improvement District No. 1 to impound, divert, and use waters of the State of Texas as set forth below.

NOW, THEREFORE, this certificate to appropriate waters of the State of Texas in the Rio Grande Basin is issued to the United States of America and the El Paso County Water Improvement District No. 1, subject to the following terms and conditions:

1. IMPOUNDMENT AND USE

   a. Certificate Holder United States is authorized to impound 2,638,860 acre-feet of water in Elephant Butte Reservoir and Caballo Reservoir in New Mexico

   b. Certificate Holders United States and El Paso County Water Improvement District No. 1 are authorized to divert and Certificate Holder El Paso County Water Improvement District No. 1 is authorized to use an aggregate amount of water from the Rio Grande not in excess of 376,000 acre-feet per year from the following sources:

      i. all rights which Certificate Holders acquired or perfected pursuant to Certified Filing No. 123;

      ii. 67/155 of all water stored in Project Storage (as defined in the Rio Grande Compact) and legally available for release

to the Elephant Butte irrigation District and the El Paso County Water Improvement District No. 1, plus any additional share of Project Water obtained by Certificate Holders, or either of them, through allocation, purchase and/or operation rules, "Project Water" being defined as all water legally dedicated to the Rio Grande Reclamation Project;

and

iii. any waters entering Texas in the bed of the Rio Grande from New Mexico, including, but not limited to, return flows from New Mexico's use and groundwater discharged into the Rio Grande.

c. In addition to the water diverted pursuant to paragraph 1.b above, Certificate Holders are authorized to divert from the Rio Grande up to 234,022 acre-feet per year of measurable surface-water based effluent, groundwater based effluent, or groundwater discharged into the Rio Grande by the District or any other entity with whom the District has entered into legal contract for such water. "Effluent" as used in this Certificate of Adjudication means any and all water that reaches the bed of the Rio Grande from agricultural drains, sewage treatment plants, or storm water runoff.

d. in addition to the water diverted pursuant to paragraphs 1.b. and 1.c. above, Certificate Holders are authorized to divert from the Rio Grande an average of 1,899 acre-feet of

water per year, when averaged over any five-year period, from tributary inflows of the Rio Grande between the Texas/New Mexico state line and the Riverside Diversion Dam.

e. Certificate Holders are authorized to use the bed and banks of the Rio Grande to transport the water which is the subject of this Certificate of Adjudication, and to operate and maintain diversion dams and works.

2. DIVERSION POINTS

a. Certificate Holders are authorized to divert all or any part of the water authorized for diversion in paragraphs 1.b and 1.c above at the following diversion points:

i. Mesilla Diversion Dam located on the Rio Grande in New Mexico;

ii. American Diversion Dam located on the Rio Grande at the point where Texas, Mexico, and New Mexico meet; and

iii. Riverside Diversion Dam located on the Rio Grande approximately 13.5 miles downstream of the American Diversion Dam;

at a combined maximum diversion rate of 1,355 cubic feet per second.

b. Certificate Holders are authorized to divert the water authorized for diversion in paragraph 1.d above, from the American Diversion Dam and the Riverside Diversion Dam at a combined maximum diversion rate of 10 cubic feet per second.

3. PURPOSE AND PLACE OF USE

Certificate Holder El Paso County Water Improvement District No. 1 is authorized to use all of the water authorized herein for agricultural, municipal, industrial, mining, or recreational purposes and/or irrigation of a maximum of 69,010 acres of land within the District's boundaries and/or to sell any of this water surplus to the District's needs for any of the authorized purposes of use in El Paso and Hudspeth Counties.

4. SPECIAL CONDITIONS

a. This Certificate of Adjudication does not supersede any legal requirement for the protection of environmental water needs pursuant to international treaty, interstate compact, or other applicable law to which Certificate Holders are subject irrespective hereof. Nothing in this condition is intended to grant to the State of Texas any authority additional to that provided by law or to waive any right of Certificate Holders.

b. This Certificate of Adjudication is not intended to in any way compromise or diminish the volume of water which the United States is obligated to provide to Mexico on an annual basis pursuant to the terms of the Convention of May 21, 1906, between the United States and Mexico; nor does the Certificate grant to the District, for any use whatsoever, any waters to which Mexico is entitled pursuant to the above referenced 1906 Convention.

c. Nothing in this Certificate of Adjudication is intended to modify any authority of the State of Texas or the United States of America provided by law, now or in the future.

5. PRIORITY

a. The time priority for use of the water included in paragraphs 1.b. and 1.c., as referenced above, is July 6, 1889.

b. The time priority for use of the water included in paragraph 1.d., as referenced above, is January 1, 1918.

The locations of pertinent features related to this Certificate of Adjudication are shown on pages 1 through 18 of the Appendix to the Report of the Investigation of Water Rights in the Upper Rio Grande (above Fort Quitman) Segment of the Rio Grande Basin, Texas. Copies of such pages are located in the office of the Texas Commission on Environmental Quality, Austin, Texas.

This Certificate of Adjudication is issued subject to all terms, conditions and provisions in the Final Decree of the 327th Judicial District Court of El Paso County, Texas, in Cause No. 2006-3219 [sic], In Re: Adjudication of All Claims of Water Rights in the Upper Rio Grande (above Fort Quitman, Texas) Segment of the Rio Grande Basin dated October 30, 2006, and supersedes all rights of Certificates Holders asserted in that cause.

This Certificate of Adjudication is issued subject to senior and superior water rights in the Rio Grande Basin.

This Certificate of Adjudication is issued subject to the rules of the Texas Commission on Environmental Quality and its continuing right of supervision of State water resources consistent with the public policy of the State as set forth in the Texas Water Code, to the extent that such rules and supervision are not inconsistent with the federal Reclamation Act (43 U.S.C. § 371, *et seq.*) or the regulations made under that Act by the Secretary of the Interior as provided in Section 11.005 of the Texas Water Code.

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

/s/ Kathleen H. White — 3/7/07

Kathleen Hartnett White, Chairman — Date Issued

ATTEST:

/s/ LaDonna Castanuela

LaDonna Castanuela,
Chief Clerk